UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

JOE A. ARMES, II, et ux,	)	No. 3:09-cv-491
JAMIE WALLACE, et ux,	)	No. 3:09-cv-504
JERRY DUNCAN, et ux,	)	No. 3:09-cv-566
SHAWN SMITH, et ux,	)	No. 3:09-cv-568
JULIA KYKER,	)	No. 3:09-cv-569
GILBERT D. PICKEL, et ux,	)	No. 3:09-cv-570
STACY MALENOVSKY, et ux,	)	No. 3:09-cv-571
GAIL TERRY, et vir,	)	No. 3:09-cv-589
T.A. AUSTIN,	)	No. 3:09-cv-590
MARK SMITH,	)	No. 3:09-cv-591
JAMES CRICHTON,	)	No. 3:09-cv-592
TERRY SAMPSON,	)	No. 3:09-cv-593
IVAN SANDLIN, et ux,	)	No. 3:09-cv-594
JERRY POWERS,	)	No. 3:09-cv-595
MICKEY CHAMBERLAIN, et al,	)	No. 3:09-cv-602
JACK NORRIS TROUTT, et ux,	)	No. 3:09-cv-603
RONALD BROWN, et ux, and	)	No. 3:09-cv-604
DOUGLAS ROSE, et ux,	)	No. 3:09-cv-605
	)	(VARLAN/GUYTON)
Plaintiffs,	)	
	)	
v.	)	
	)	
TENNESSEE VALLEY AUTHORITY,	)	
	)	
Defendant.	)	

MOTION TO EXCLUDE THE PROPOSED EXPERT TESTIMONY OF LESLIE SELLERS PURSUANT TO FEDERAL RULE OF EVIDENCE 403 AND REQUEST FOR A *DAUBERT* HEARING

Defendants have disclosed an Anderson County real estate broker and appraiser, Leslie Sellers, as an expert witness who proposes to testify concerning his calculation of the market property values allegedly experienced by Plaintiffs in the above actions as a result of the Kingston dike failure, and contends the spill did not affect their property values.

Pursuant to the Scheduling Orders entered in these cases, Plaintiffs move the Court to exclude Mr. Sellers' proposed testimony on reliability under *Daubert* and Fed. R. Evid. 403 relevance grounds and request for a *Daubert* hearing.

Mr. Sellers' opinions do not rise to the level of relevant admissible expert testimony because his requested methodology by TVA is unreliable and because his judgments rest only on his own unsupported perceptions which lack any relevant factual underpinning and are inconsistent with his own ethical requirements and publications, one of which he personally drafted the Foreword. Of note, he only did a market comparison between Anderson and Roane counties over a cumulated decade with no analysis conducted studying lakefront or lakeview properties, or property located in close proximity to the spill.

FACTS

Mr. Sellers drafted an Appraisal Review and Market Analysis in these cases that did not consider properties that were lakefront or lakeview properties near the spill.[1, 2, 3] (Ex. 1, p. 22, L. 1-8; Ex. 2, p. 3). Mr. Sellers contends that publications from the Appraisal Institute are reliable and authoritative, and in essence the **Bible** of his profession. (Ex. 1, p. 11, L. 20; p. 12, L. 4; Ex. 3). Mr. Sellers' Report is an Appraisal Review that cites such publications. (Ex. 1, p. 23; Ex. 3). His report in these cases only considered resales, not actual sales. (Ex. 1, pp. 30, 33). He drafted the Foreword of "Appraising the Appraisal: The Art of Appraisal Review." (Ex. 3, Foreword). His Report is an Appraisal Review. (Ex. 2).

Pursuant to Federal Rule of Evidence 403, Mr. Sellers' testimony is irrelevant based upon the following grounds:

[1] Plaintiffs contend the majority of Plaintiffs' properties were in the area of which the river was closed, most of which were within a one (1) mile radius of the spill area. This was not considered.

[2] Mr. Sellers limited his brokerage experience for the last decade predominantly to selling commercial real estate. (Ex. 1, p.14, L.1-12).

[3] Mr. Sellers really has had no listings since the date of the ash spill in Roane County. (Ex. 1, p. 15, L. 4-12).

1. Mr. Sellers' scope of work and purpose of his Report was not to do a before and after appraisal on Plaintiffs' properties before and after the spill as it pertains to diminution in value. (Ex. 1, p. 22, L. 1-8; Ex. 2, p. 3). Therefore, on this ground alone his testimony is irrelevant. Further, Exhibit 2 page 3 states "The objective of my report is not to appraise individual properties but to investigate … the Roane County real estate market … ." Mr. Sellers' Bible, in which he drafted the Foreword, states "An attentive reviewer would notice the following issue after reading this letter:

> 1. 'The purpose of this appraisal is to develop an opinion of the market value of the subject property as proposed.'
>
> > This statement should alert the reviewer to an unstated hypothetical condition situation (assuming "that which is contrary to what exists"), in this case assuming that an economically stabilized lodging facility already exists on the site. This situation can be very misleading to a client, particularly one not accustomed to reviewing appraisal reports." (Ex. 3, p. 98).

(emphasis added.)

This too should alert the Court that his analysis requested by TVA regarding the scope of work is faulty by the very fact he goes on to state "he is not making an appraisal of Plaintiffs' properties either before or after." (Ex. 1, p. 23; Ex. 2, p. 3). Therefore, excluding *Daubert,* his opinion is irrelevant under Fed. R. Evid. 403.

2. On page 159 of Mr. Sellers' Bible is a list of a number of unacceptable practices that further make his opinion irrelevant and unreliable. (Ex. 3, p. 159). They include, but are not limited to:

- "Failure to comment on negative factors with respect to the subject neighborhood, the subject property, or proximity of the subject property to adverse influences." (i.e. a nearby or adjacent EPA superfund site.)
- "Selection and use of inappropriate comparable sales." (Not considering lakefront or lakeview at the area close to the spill.)
- "Failure to use comparable sales that are the most locationally and physically similar to the subject property." (See previous.)
- "Use of comparable sales in the valuation process when the appraiser has not personally inspected the exterior of the comparable property." (Ex. 1, p. 41).
- "Failure to address and note adverse factors or conditions that affect value or marketability with respect to the neighborhood, site or improvements."

3. Mr. Sellers does not know the number of lakefront properties sold in 2009 and 2010. Mr. Sellers cannot say anything regarding properties selling five (5) miles down stream of the ash spill. (Ex. 1, p. 33, L. 19-25).

4. "Q: I understand. I understand. But since it is lake front, would that be, on your hierarchy of considerations, would that be up there at the top or near the top?

A: It would be an important consideration." (Ex. 1, p. 54, L. 6-21).

5. TVA did not inform Mr. Sellers of:

a. TVA's impairment of Roane County's economy as a result of the spill. (Ex. 1, p. 72, L. 6-16).

b. EPA clean up cost. (Ex. 1, p. 72, L. 16-22).

c. Long term recovery. (Ex. 1, p. 73, L. 1-17).

6. All of these matters are important according to his Bible. (Ex. 2, pp. 38-39).

7. Mr. Sellers concedes he is not doing a full review further negating his relevance. (Ex. 1, p. 93, L. 19-21).

*Based upon the preceding and the fact he did not do a full review, his testimony should be excluded upon Fed. R. Evid. 403 and *Daubert*. (Ex. 1, p. 93, L. 19-21, p. 96).

8. Corroborating that is Advisory Opinion 9 (Ex. 4), he referred to throughout his deposition beginning on page twenty (20), that states:

> SUBJECT: Responsibility of Appraisers Concerning Toxic or Hazardous Substance Contamination
>
> Recognition of Contamination
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> The appraiser becomes aware of contamination through disclosure by the client and known facts prior to the acceptance of an appraisal assignment, or through the normal observation and research conducted during an appraisal assignment. . . . These estimates are typically provided by environmental consulting specialists that are properly versed in federal and state environmental requirements and are qualified to assess and measure the materials and/or methods appropriate for remediation or compliance. Other professionals that deal with legal liabilities and business operations may also be involved in the cost estimate process. An appraiser may reasonably rely on the findings and opinions of qualified specialists in environmental remediation and compliance cost estimation.
>
> Value Estimates of Interests in Impacted Real Estate
>
> These clients may request an appraiser to appraise real estate that is or may be contaminated under the hypothetical condition that the real estate is free of contamination. An appraiser may appraise interests in real estate that is or is believed to be contaminated based on the hypothetical condition that the real estate is free of contamination when … (3) the ETHICS PROVISION of the USPAP is satisfied. To avoid confusion in the marketplace, the ETHICS PROVISION requires a deep and accurate disclosure of the factual contamination problem as well as a statement of the

> validity of and useful purpose for the extraordinary assumption that the real estate is not affected.
>
> When qualified specialists have documented the existence of contamination and estimated the costs of remediation or compliance, an appraiser may be in a position to estimate as is value and should be aware of, understand, and correctly employ those recognized methods and techniques necessary to produce a credible appraisal. The value of an interest in impacted or contaminated real estate may not be measurable by simply deducting the remediation or compliance cost estimate from the estimated value as if unaffected. Other factors may influence value, including any positive or negative impact on marketability (stigma) and the possibility of change in highest and best use.

This consideration in the scope of work was not performed and its relevance including the lack of consideration of proximity to the superfund clean up site were not appropriately considered. (Ex. 1, pp. 107-122).

Memorandum of Law Meriting Exclusion

In *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 589 (1993), where the Supreme Court made it clear that a district court must ensure that all expert testimony or evidence admitted "is not only relevant, but reliable." Mr. Sellers' testimony is not relevant and admittedly incomplete. He does not consider lake property sales of Watts Bar. He is comparatively considering resales from Briceville, Clinton, Claxton, Oliver Springs and Oak Ridge.

The Court must make a preliminary assessment of "whether the reasoning or methodology underlying the testimony is scientifically valid ***and*** of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. The proponent of expert testimony bears the burden to establish relevance (or "fit") and reliability. *See, e.g., Vanderpool v. Edmondson*, No. 1:01-cv-147, 2005 WL 5164857, at *2 (E.D. Tenn. Mar. 23, 2005); *Wynacht v. Beckman Instruments, Inc.*, 113 F. Supp. 2d 1205, 1207 (E.D. Tenn. 2000).[4]

Another pertinent consideration in the reliability inquiry is whether the "experts' opinions were formed for purposes of litigation." *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 252 (6th Cir. 2001). This factor in accords with the established principle "that close judicial analysis of expert testimony is necessary 'because expert witnesses are not necessarily always unbiased scientists.'" *Id.* This is obviously the applicable case here based upon the requested scope of work. (Ex. 1, pp. 27-28;. Ex. 2, p. 3).

In sum, Mr. Sellers' does not approach the standard for admissibility of expert testimony set by the Federal Rules of Evidence. For example, Rule 702(1) specifically provides that a proffered expert witness will only be allowed to testify and offer opinions if "the testimony is based on sufficient facts or data." Thus, before it determines admissibility of an expert's testimony, the Court "must confirm that the 'factual underpinnings of the expert's opinions [are] sound.'" *United States v. Martinez*, 588 F.3d 301, 323 (6th Cir. 2009). See *United States v. Rincon*, 28 F.3d 921, 924 (9th Cir. 1994) The fact that there is not a lakefront or lakeview market analysis or one that analyzes property close to the spill makes such testimony irrelevant under Fed. R. Evid. 403 and unreliable under Fed. R. Evid. 702.

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[4] The Sixth Circuit and this Court have regularly applied principles of relevance and reliability to find proposed expert testimony inadmissible. *See, e.g., Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671 (6th Cir. 2011) (affirming exclusion of expert causation opinions in toxic tort case and affirming summary judgment for lack of causation evidence); *Tamraz v. Lincoln Elec. Co.,* 620 F.3d 665 (6th Cir. 2010) (reversing a $20.5 million jury verdict because the district court erred in admitting expert testimony regarding disease causation), *cert. denied*, 2011 WL 863879 (U.S. May 16, 2011): *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244 (6th Cir. 2001) (affirming exclusion of expert causation opinions in toxic tort case and affirming summary judgment for lack of causation evidence); *Downs v. Perstorp Components, Inc.,* 126 F. Supp. 2d 1090 (E.D. Tenn. 1999) (excluding expert causation opinions in toxic tort case), *aff'd,* 26 F. App'x 472 (6th Cir. 2002); *Pride v. The Bic Corp.* 54 F. Supp. 2d 757 (E.D. Tenn. 1998) (excluding expert causation opinions in products liability case and granting summary judgment for lack of causation evidence), *aff'd,* 218 F.3d 566 (6th Cir. 2000),

The recent decision in *Freibel v. Paradise Shores of Bay County, LLC*, No. 5:10-cv120/RS-EMT, 2011 WL 2420230 (N.D. Fla. June 13, 2011), in which the district court rejected expert testimony is appropriate in this matter, because expert proof in diminution in value was excluded based upon lack of temporal proximity and improper extrapolation. That is what Mr. Sellers has reported to this Court. Just as in *Freibel*, his case study was not analogous to the subject properties as is the case here as admitted in his Report (Exhibit 1 p. 22, L. 1-8; Ex. 2, p. 3).

Based upon the preceding facts and law, Mr. Sellers should be excluded from testifying in this matter.

Respectfully submitted this 15th day of August, 2011.

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s/James K. Scott
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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2011, a copy of the foregoing Motion was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

This 15th day of August, 2011.

s/James K. Scott
James K. Scott